BAN BEE & CO. LTD. v. HENRY WAUGH & CO. LTD.

[O. C. J. (Spenser Wilkinson J.) March 19, 1955]

[Penang — Civil Suit No. 65 of 1953]

Contract — Sale of goods — Indent for supply less than that of alleged oral agreement — Acceptance of order — Evidence Ordinance, 1950, ss. 91 and 92 — Sale of Goods Act, s. 4.

This was a claim by the plaintiffs for breach of a contract for the sale of goods by the defendants. The plaintiffs' case was that the defendants through their agents orally agreed to sell and the plaintiffs through their agents orally agreed to purchase textile goods to the value of $500,000 subject to certain terms. A few days after the alleged agreement, the plaintiffs ordered goods from the defendants to the value of approximately $117,500 and both parties signed indent forms in respect of the goods ordered.

Held: (1) presuming that there was a good oral contract for the sale of $500,000 worth of goods then the signed indent form would not have been a reduction of the contract into writing and ss. 91 and 92 of the Evidence Ordinance would not apply; (2) as the plaintiffs could not bring themselves within one of the exceptions mentioned in s. 4 of the Sale of Goods Act, the verbal agreement as alleged was unenforceable; (3) indent forms are the normal and recognised form of written contract for sale of this type of goods; (4) acceptance of part of an order is sufficient to obviate the necessity of a written memorandum, where it indicates the existence of a contract and gives support to evidence otherwise purely verbal. The indents signed by both parties in this case did not indicate the existence of a contract for a larger quantity or any other contract.

Case referred to:—

(1) *Scott v. Eastern Counties Railway Co.* 65 R. R. 224.

CLAIM for Damages.

Ong Huck Lim (*Eusoffe Abdoolcader* with him) for the plaintiffs.

F. G. Pooley for the defendants.

Cur. Adv. Vult.

Spenser Wilkinson J.: — This was a claim for damages for breach of a contract for the sale of goods. The plaintiffs' case was that on some date early in November, 1952 Mr. Marchant, the Assistant in charge of the defendants' textile department in Penang called with his salesman, Mr. Chew Chin Siew upon Mr. Cheah Phee Cheok, the Managing Director of the plaintiff Company and that at that interview the defendants, through their agent, Mr. Marchant agreed to sell and the plaintiffs, through Mr. Cheah Phee Cheok agreed to purchase textile goods to the value of $500,000 manufactured by two Mills in India during the period January to June, 1953 upon the terms *inter alia* that the price was to be the price set out in the Mills' price lists plus 5% commission; costs, insurance, freight and other charges were to be borne by the plaintiffs. All orders were to be subject to confirmation by the Mills.

It is common ground that there was an interview between Mr. Marchant and his salesman and Mr. Cheah Phee Cheok on or about the date alleged; that there was a second interview the following day when samples of the Mills' goods were handed to Mr. Cheah Phee Cheok; and that in pursuance of those interviews the plaintiffs some days later placed an order with the defendants for goods to the value of approximately $117,500. Confirmation of these orders was obtained from the Mills (with two exceptions which do not affect this case) and indent forms were prepared and signed by both parties in respect of the goods thus ordered. The indents were signed on behalf of the defendant by Mr. Phillips, the Manager of their Penang Branch.

It was contended at the outset by Mr. Pooley on behalf of the defendants that by reason of sections 91 and 92 of the Evidence Ordinance no evidence could be given of the alleged oral agreement and that in any event any such agreement was unenforceable by reason of section 4 of the Sale of Goods Act. But the way in which the plaintiffs put their case was that the verbal agreement was a complete contract for the sale of $500,000 worth of goods and that the signed indent forms were not the contract but merely a first detailed order under the main contract and that as the first batch of goods was delivered and accepted this, under section 4 of the Sale of Goods Act, dispensed with the necessity of a memorandum in writing. It appeared to me, therefore, that it was necessary to hear the evidence (subject to such objections as might be raised by the defendants) in order to see what the nature of the contract, if any, was and whether the delivery of the first batch of goods entitled the plaintiffs in all the circumstances to enforce the contract.

As to sections 91 and 92 of the Evidence Ordinance it appeared to me that if there was a firm oral contract for the sale of $500,000 worth of goods then the signed indents would not have been a reduction of this contract into writing but merely part of the machinery for carrying it out — the principal contract would still be a verbal one and sections 91 and 92 would not apply. I, therefore, took all the evidence tendered, subject to the over-all objection by the defendants that no evidence of the oral contract was admissible by reason of those provisions of the Evidence Ordinance.

It is clear that unless the plaintiffs can bring themselves within one of the exceptions mentioned in section 4 of the Sale of Goods Act, the verbal agree-

ment alleged is unenforceable. Although it is not necessary for me to decide this point I think I ought in case I am wrong on the facts to express my view. The plaintiffs relied upon the proposition stated on page 29 of *Chalmer's Sale of Goods Act* under the sub-heading "Part of the goods", and in particular upon the case of *Scott v. Eastern Counties Railway Co.*[1] and similar cases. I do not think these cases apply to the present case. Assuming the existence of a verbal contract for the whole quantity of half a million dollars' worth of goods it would no doubt be necessary from time to time for the plaintiffs to forward written orders specifving the particular goods required in each batch until the whole had been supplied; but on this basis it would clearly not be necessary for both parties to sign forms of indent which are the normal and recognised form of written contract for the sale of this type of goods. The difficulty from the plaintiffs' point of view here is that indents signed by both parties for the supply of $117,500 worth of goods do not in any way indicate or suggest the existence of a contract for a larger quantity or indeed of any other contract; and as I understand the decided cases on the question of acceptance the principle upon which they rest is that an acceptance of part of an order is sufficient to obviate the necessity of a written memorandum, because it indicates the existence of a contract and thus gives support to evidence otherwise purely verbal. In such cases the acceptance of the goods is referable only to some pre-existing contract — the fact of acceptance of goods indicates that there must have been some contract in regard thereto. If there had been nothing in writing in this case then the acceptance of this first batch of goods would no doubt be a sufficient indication of the evidence of some contract; but having brought into existence what I might call watertight written agreements in respect of $117,500 worth of goods the acceptance of the goods is referable only to that written agreement and does not, therefore, suggest the existence of some different oral agreement. It is, indeed, more consistent with the non-existence of such an oral agreement than with its existence. No decided case was cited to me and I can find none in which delivery and acceptance of goods under a *written* contract has been held to be such acceptance as will support the existence of an oral contract for a larger quantity.

Turning now to the facts I am doubtful if the evidence tendered on behalf of the plaintiffs is sufficient in itself to prove the agreement alleged. The relevant parts of the evidence of Mr. Cheah Phee Cheok himself are as follows :—

"Then Mr. Marchant further said that if I could give him substantial orders for the goods manufactured by these Mills he could give us special terms.

He said he would charge 5% commission on the current F.O.B. prices according to the Mills' invoice; and that I was to pay freight, insurance and duty levied by the Indian Government.

I further said that sales in Penang and Malaya would be limited because the Indonesian Government did not issue import licences, so that we could not export from Penang.

He showed me the current price list of the Mills. I further told him that it was the end of the year and that from January to June next year I would give him $500,000/- worth of business.

That is for the goods produced by these Mills.

He replied that he was very pleased and much satisfied at our giving him such a substantial order.

There were many qualities of these goods and I said whatever qualities were booked by me should not be available to other dealers.

I told Mr. Marchant I would give him the first batch of orders for January-February and that I would complete the $500,000/- worth of goods from time to time within the six months.

As to the method of payment for the goods from the Mills I told him I would establish letters of credit with the Mills direct so that the shipment would be in our name and he replied that he would have to discuss this point with the Manager, Mr. Phillips.

Then he went back, and next day he came with the salesman again with the samples. He brought 70 or 80 samples but I only selected these samples — twelve different qualities. Eleven are here. I gave the other to a customer (11 samples put in and marked Ex. P. 1).

I told him I would like to make enquiries in the market as to which qualities were more saleable and I would let him know in a few days' time.

In a few days' time Mr. Marchant and the salesman came and I selected twelve qualities. The salesman took a note in order to place the order for those qualities."

Then there is the evidence of the salesman, Mr. Chew Chin Siew as follows :—

"Mr. Marchant instructed me to tell Mr. Phee Cheok the object of our visit. I told him that we would like to obtain his orders for textiles, particularly those from the Buckingham and Bangalore Mills. I also said that provided he could place orders for substantial quantities Henry Waughs would accord him special terms. i.e. they would charge 5% commission on the current Mills' F.O.B. prices plus freight. insurance and export duty in India plus landing charges.

Mr. Phee Cheok then informed me that trade with Indonesia was on the decline otherwise he considered he could do a large amount of business in textiles.

But he asked: 'If I placed orders to the extent of $500.000/- for shipment during January to June, 1953 would I be entitled to these special terms?'

Mr. Marchant replied: 'Oh, satisfactory'.

Then we shook hands and before we left Mr. Phee Cheok told us that in the course of the next few days his first batch of orders for shipment January/February would be given to us.

Mr. Marchant told me that he had instructions from the office to offer these terms. I saw a letter from Singapore with instructions to offer these terms.

A few days after the interview I received orders from Mr. Phee Cheok for a total of approximately 100,000 yards of various qualities of various textiles from the Buckingham and Bangalore Mills."

If this evidence stood alone and were wholly acceptable I think it would be difficult to spell out of it a definite and binding contract for the sale of $500,000 worth of goods. The nearest approach to words of contract in this evidence are those imputed to Mr. Marchant by Mr. Cheah Phee Cheok "he was

very much pleased and much satisfied at our giving him such a substantial order"; but this form of words is not borne out by Mr. Chew Chin Siew. The first interview as described by Mr. Cheah Phee Cheok sounds much more like a negotiation to do business than a binding contract — and it is insisted that it was at the first interview that the contract was made. It is admitted by Mr. Cheah Phee Cheok that at least one most important term — namely the method of payment — was one which Mr. Marchant stated he could not arrange without consulting his Manager. Mr. Chew Chin Siew said in examination-in-chief that the condition as to local letters of credit was mentioned but later in his evidence he said that Mr. Marchant agreed to payment of cash on delivery and in fact the first sets of indents were drawn upon these terms. These were later replaced by corrected indents signed by both parties. This admission by Mr. Cheah Phee Cheok indicates, I think, not only that no final terms were agreed upon but also that Mr. Marchant had not, to the knowledge of Mr. Cheah Phee Cheok, authority to contract on behalf of the defendants. Moreover, another important alleged term as to qualities booked by the plaintiffs being reserved exclusively to them was not mentioned by Mr. Chew Chin Siew in his evidence-in-chief and Mr. Cheah Phee Cheok's evidence about it was very vague.

I do not propose to deal in detail with the admitted documents and correspondence. There is one letter, however, which I ought to mention, as it was relied upon by the plaintiffs. This is a letter dated the 11th December, 1952 written by the Penang Branch of the defendant Company to their Singapore Office, after the latter had stopped all further dealings in regard to Indian goods on the 5% commission terms (page 47 of the agreed bundle, Ex. A). The letter is signed by Mr. Phillips and contains the following passage :—

"Incidentally, since starting to write this letter, we have been approached by Messrs. Ban Bee who inform us that they are now ready to give us orders for March and April shipment and during the course of conversation, they have guaranteed to take up approximately half a million yards during the first six months of 1953."

In the first place it appears to me that this letter refers to a conversation which took place at a much later date than the making of the alleged contract. No doubt at some time, probably at one of the first two interviews, Mr. Cheah Phee Cheok gave some indication or estimate to the defendants that he would be prepared to order goods up to the value of half a million dollars during the first six months of 1953 and I am of opinion that the word "guaranteed" is used in this letter in this sense. I am quite satisfied, however, that the figure, whenever it was mentioned, was put forward as an estimate of what the plaintiffs could do and was so put forward as an inducement to the defendants to do business with the plaintiffs. Whether this indication or estimate be described in Mr. Marchant's words as an "estimate" or in Mr. Phillips' words as a "puff" I am satisfied that Mr. Cheah Phee Cheok when he mentioned this figure did not intend to bind himself in law to accept goods to this value. I believe the idea that there was a firm contract for $500,000 was an after thought which came into being only after the plaintiffs found difficulty in inducing the defendants to do further business upon the 5% terms. The first written mention of such a contract is contained in a letter written by the plaintiffs on the 3rd February, 1953 (page 55 of Ex. A).

Any doubts I might have had on the question of fact whether there was a verbal contract were set at rest by the evidence of Mr. Marchant. He appeared to me to be a straightforward and honest witness who was entirely unshaken by cross-examination, and I had no hesitation in accepting his evidence taken in conjunction with the admitted documents and correspondence and the general evidence of the case in preference to that of Mr. Cheah Phee Cheok and Mr. Chew Chin Siew, whose respective versions were not entirely consistent with each other.

From Mr. Marchant's evidence it appears to me to be quite clear that the interviews he had with Mr. Cheah Phee Cheok were business discussions entered into with a view to obtaining orders and that any mention there may have been of the figure of half a million dollars was in the form of an estimate given by Mr. Cheah Phee Cheok of the amount of business he anticipated entering into during the ensuing six months.

I therefore find as a fact that at neither of the two interviews described by the plaintiffs' witnesses nor at a continuation of the two interviews did either party intend to make or in fact make any agreement for the sale of goods by the defendants to the plaintiffs; and that the interviews amounted only to preliminary negotiations which culminated in the contract later entered into between the parties, namely that for the supply of approximately $117,500 worth of goods as set out in the signed indents.

There will, therefore, be judgment for the defendants with costs.

Claim dismissed.

Solicitors: *Ong Huck Lim & Co.; Presgrave & Matthews.*